No. 78-557

In the Supreme Court of the United States

OCTOBER TERM, 1978

BONNIE JAYNE SWOROB, ET AL., PETITIONERS

v.

PATRICIA ROBERTS HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the district court (Pet. App. 1-27) is reported at 451 F. Supp. 96. The court of appeals did not write an opinion.

JURISDICTION

The judgment order of the court of appeals (Pet. App. 30-31) was entered on July 6, 1978. The pe-

tition for a writ of certiorari was filed on October 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the doctrine of res judicata bars petitioners from relitigating their claim based on the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*

2. Whether the doctrine of laches bars petitioners from litigating their NEPA claim.

3. Whether NEPA applies to a project as to which all major federal action was taken prior to the effective date of the Act.

STATEMENT

This is petitioners' second petition for a writ of certiorari arising out of the same events and raising the same issue. The underlying facts are set forth in the opinion of the district court and the court of appeals in the original lawsuit, *Resident Advisory Board* v. *Rizzo*, 425 F. Supp. 987 (E.D. Pa. 1976), rev'd in part, 564 F.2d 126 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978) (hereinafter *RAB* v. *Rizzo*), and in the district court's opinion in this case.

1. Petitioners are the Whitman Council, Inc., three individual residents of the Whitman Urban Renewal Area in South Philadelphia, and Connie McHugh, a resident of an adjoining urban renewal area. The organizational petitioner, consisting of white residents of the Whitman Urban Renewal Area, was

formed in the early 1960s as the Whitman Area Improvement Council (WAIC) for the purpose of opposing the construction of certain federally funded low-income housing (henceforth "the Whitman project"). WAIC was incorporated as the Whitman Council, Inc. in 1977 (Pet. App. 4).[1]

2. In 1971 WAIC intervened as a defendant, on behalf of all residents of the Whitman Urban Renewal Area and "all other persons acting in concert with them or otherwise participating in their aid," in a civil rights action filed by RAB, an organization of low-income residents of public housing in Philadelphia and by various persons eligible for low-income public housing there. *RAB* v. *Rizzo*, 425 F. Supp. 987. Plaintiffs in that action alleged that defendants (the City of Philadelphia, the City's housing authority, its redevelopment authority, and HUD) had violated their rights under the Constitution and federal civil rights statutes by failing to build the planned Whitman project in a predominantly white residential area.[2] In its answer to plaintiffs' second amended supplemental complaint, WAIC asserted that the Whitman project could not, in any event, be built until an environmental impact statement had been filed by HUD or the appropriate City authorities (Pet. App. 5). WAIC did not, however, raise

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[1] We will refer to the organizational petitioner as "WAIC."

[2] Plans to build the project became final in 1969. Construction was to begin in 1971, but, as a result of demonstrations by WAIC members that prevented workers from entering the job site, construction was halted.

this issue in its proposed findings of fact and conclusions of law. *Ibid.*

The district court in that action held that the City had acted with racially discriminatory motivation in delaying and frustrating construction of the planned project in the predominantly white Whitman neighborhood, and thereby violated plaintiffs' constitutional and statutory rights, and that the actions of the other governmental defendants, because of their discriminatory impact, violated a provision of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3608(d)(5).[3] The court ordered the governmental defendants to "take all necessary steps" for the construction of the project. *RAB* v. *Rizzo, supra*, 425 F. Supp. at 1029.

The court of appeals affirmed the district court's findings and order, with exceptions not here pertinent. *RAB* v. *Rizzo, supra*, 564 F.2d at 130, 150-153. In its brief on appeal WAIC had again raised the National Environmental Policy Act (NEPA) issue. The court of appeals, taking note of the fact that WAIC had failed to pursue the issue in the district court after initially raising it in its answer, declined to entertain the question. 564 F.2d at 151.

[3] With regard to WAIC, the court found the evidence insufficient to prove discriminatory motivation but noted that comments by members "displayed racial bias," and that the organization's stated reasons for opposing the project lacked substance. *RAB* v. *Rizzo, supra*, 425 F. Supp. at 1024. WAIC thereafter filed a motion to amend the court's order but did not mention its environmental claims.

WAIC unsuccessfully sought review by this Court, presenting the NEPA issue as the sole question for review (77-759 Pet. 2-3) and asserting that it had raised and proved its NEPA claim below.

3. Eight days after this Court denied certiorari in *RAB* v. *Rizzo* (see 435 U.S. 908), petitioners filed the present suit, again asserting that the Whitman project cannot lawfully be built until HUD prepares an environmental impact statement. After petitioners completed presentation of their case in a trial to the district court, respondents below moved for an involuntary dismissal, pursuant to Fed. R. Civ. P. 41(b). The court granted the motion and entered judgment for defendants, finding petitioners' claim (1) barred by the doctrine of res judicata, (2) not entitled to consideration because of laches, and, in any event, (3) lacking in merit. The court of appeals summarily affirmed (Pet. App. 30-31).

ARGUMENT

The courts applied settled principles to the facts of this case, and there is no reason for review by this Court.

1. Petitioners contend (Pet. 21-23) that the causes of action in question "are not identical," that there is no identity of parties, and that, accordingly, the doctrine of res judicata does not operate to bar their claim here. These contentions are erroneous.

Petitioners assert (Pet. 21-22) that *RAB* v. *Rizzo* was a "civil rights" action and that the present case is an action to vindicate the policies of NEPA. This

is true but irrelevant, because *petitioners'* cause of action here is identical to the one they asserted as intervening defendants and then abandoned in *RAB* v. *Rizzo*. Because all environmental questions could (and should) have been adjudicated in the earlier case, petitioners are precluded from raising them again here. *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948); *Jamerson* v. *Lennox*, 356 F.Supp. 1164 (E.D. Pa. 1972), aff'd, 414 U.S. 802 (1973); *Restatement of Judgments* § 1 (1942).

Petitioners' contention that there is no identity of parties is based on their assertion that petitioner Connie McHugh was not a party to the earlier suit. This assertion is contrary to the express finding of the district court (Pet. App. 4-5) that McHugh was an active supporter of WAIC in its efforts to stop construction of the townhouses in question and thus within the class represented by WAIC in the earlier suit, a class that included all residents of the Whitman Urban Renewal Area and "all other persons acting in concert with them or otherwise participating in their aid." *RAB* v. *Rizzo*, 564 F.2d 126.

2. The district court also properly found that petitioners are barred by the doctrine of laches from pressing the NEPA claim now (Pet. App. 8-11). Eight years elapsed from the effective date of NEPA to the filing of this suit. Petitioners have shown no justification for failing to pursue the claim earlier, particularly in view of the opportunity to do so in

RAB v. *Rizzo*; and, as the district court found (Pet. App. 10-11), the delay prejudices both the respondents and the public. The requisites for applying laches are thus established here. *Gardner* v. *Panama Railroad Co.*, 342 U.S. 29, 30-31 (1951); *Costello* v. *United States*, 365 U.S. 265, 282 (1961).

Petitioners argue (Pet. 20) that the doctrine of laches is inapplicable because they "seek vindication of Congressional policies aimed at benefiting the public generally * * * [and] the public-at-large will suffer when meritorious environmental challenges are foreclosed." Whatever the merits of such a public policy argument in the abstract, it has no relationship to the facts of this case. Petitioners' environmental concerns (Pet. 24) are insubstantial and are outweighed by competing public interests. *Shiffler* v. *Schlesinger*, 548 F.2d 96, 103 (3d Cir. 1977). Further delay in construction of the Whitman project will irreparably injure low-income residents who are in need of decent housing. It will also thwart effectuation of the outstanding court order in *RAB* v. *Rizzo*, which requires "the construction of the Whitman project as planned without further interference." 564 F.2d at 150. Finally, NEPA, like other federal statutes, "demands, if it is to achieve its objective, a certain duty of attentiveness from citizens. If there were more watchfulness on the receiving end, there would be much less likelihood" of allowing environmental concerns to be neglected until too late. *Ogunquit Village Corp.* v. *Davis*, 553 F.2d

243, 246 (1st Cir. 1977). Petitioners are not entitled to equitable relief here.[4]

3. Even assuming that petitioners were entitled to a hearing on the merits of their claim, the district court correctly ruled against them. NEPA, which became effective on January 1, 1970, requires that all federal agencies file environmental impact statements whenever they propose to undertake "major * * * actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). Shortly after passage of the Act, the Council on Environmental Quality issued guidelines providing that, as to projects and programs begun before NEPA's effective date, such statements would be required "[t]o the maximum extent practicable" for "*further* major Federal actions having a significant effect on the environment." 36 Fed. Reg. 7724, 7727 (1971) (emphasis added). In keeping with this guideline, HUD requires NEPA review for previously planned projects when a significant action subsequent

[4] Petitioners contend (Pet. 20-21) that the court's holding on laches conflicts with decisions of other courts of appeals. The circuits have consistently held, however, that laches is fully applicable in NEPA cases and is a question primarily addressed to the district court. See, *e.g.*, *Shiffler* v. *Schlesinger*, *supra*, 548 F.2d at 103-104; *City of Rochester* v. *U.S. Postal Service*, 541 F.2d 967, 977 (2d Cir. 1976); *Ecology Center of Louisiana, Inc.* v. *Coleman*, 515 F.2d 860, 867 (5th Cir. 1975); *Lathan* v. *Volpe*, 455 F.2d 1111, 1122 (9th Cir. 1971). The cases cited by petitioners to demonstrate "conflict" are distinguishable; the delays, which were substantially less than the eight years here, were held to be "reasonable" and to have resulted in no prejudice to defendants or the public.

to NEPA's effective date takes place, such as an approval of a "major amendatory." HUD Handbook 1390.1, ch. II, ¶ 5.a.(4), 38 Fed. Reg. 19185 (1973). A "major amendatory" is defined as "a significant change in the nature, magnitude or extent of the action from that which was originally evaluated and which may have a significant [e]ffect on the quality of the human environment such as an environmentally significant change in location or site, area covered, size or design." *Id.* at ch. I, ¶ 2.f., 38 Fed. Reg. 19183.

The question whether "major federal action" has occurred after 1969 is an essentially factual matter that must be decided case-by-case. See, *e.g.*, *Olivares* v. *Martin*, 555 F.2d 1192, 1197 (5th Cir. 1977); *Hart* v. *Denver Urban Renewal Authority*, 551 F.2d 1178, 1182 (10th Cir. 1977); *Virginians for Dulles* v. *Volpe*, 541 F.2d 442, 446-447 (4th Cir. 1976); *Jones* v. *Lynn*, 477 F.2d 885, 890 (1st Cir. 1973); *San Francisco Tomorrow* v. *Romney*, 472 F.2d 1021, 1025 (9th Cir. 1973). There is thus no merit to petitioners' suggestion (Pet. 13-16) that the decision here is in clear conflict with decisions of other courts of appeals concerning the applicability of NEPA to other projects begun before the effective date of NEPA. Here the district court found (Pet. App. 11-26) that all major federal actions concerning construction of the Whitman project had occurred before January 1, 1970. As the court observed (Pet. App. 18):

> [T]he Whitman site was designated for housing fourteen years before the effective date of

NEPA; the site was cleared of all existing properties ten years prior to NEPA; the basic design and size of the project was approved three years prior to NEPA; and the 120 townhouses will be constructed on the site occupied by houses demolished pursuant to the redevelopment plan.

The record amply supports the district court's finding on this question, and further review is unwarranted.[5]

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[5] Petitioners assert (Pet. 5-10) that in 1973 certain HUD officials began a special environmental assessment of a number of Neighborhood Development Program areas, including the area in which the Whitman project was to be built; that the assessment was suspended after the litigation in *RAB* v. *Rizzo* was under way; and that a HUD official testified at trial that an environmental assessment might still be in order to determine whether vehicular traffic in the Whitman area will generate unacceptable noise levels for people living on the site to be occupied in part by the Whitman townhouses. Petitioners incorrectly reason from this that an environmental impact statement is required before the Whitman townhouses can be built. The fact that HUD may have done more than is strictly required by NEPA does not, however, detract from the district court's finding, which reflects HUD's published policies, that no major federal action has been taken in connection with the Whitman project, since the effective date of NEPA. As to the potential noise problem, the district court properly noted (Pet. App. 24, 26) that the construction of 120 townhouses for low-income persons is hardly likely to be a significant contributor, and, in any event, HUD and other agencies responsible for development in the area are free to take measures to alleviate it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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